

Muzammil Izat bin Hashim v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44-23 OF 2003

AUGUSTINE PAUL J

30 JULY 2003

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Criminal Procedure — Defence — Discovery — Application for — Whether order made in an application for discovery final in effect and appealable — Whether High Court may revise order made in discovery application

Criminal Procedure — Trial — Defence — Whether accused entitled to know means by which prosecution proposes to prove the facts alleged in the charge

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Evidence — Statement — Right of accused to copies of statements — Whether accused entitled to copies thereof — Criminal Procedure Code s 51

The accused was charged with rape in the Kuala Lumpur Sessions Court. He made an oral application to be supplied with particulars of the witnesses, their statements to the police, sketch plan and photographs taken at the scene. The application was dismissed. He later made a written application which he withdrew. A similar application was refiled but was dismissed by the sessions court on the ground that the matter had already been adjudicated upon when the oral application was dismissed. The accused thereafter filed a notice of motion in the High Court praying for a similar order in the exercise of the High Court's revisionary powers.

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Held, dismissing the application:

- (1) The applications made in the High Court and in the sessions court were for the production of documents considered necessary for the trial the accused was facing. What the defence in a criminal trial is entitled to and what it is the duty of the prosecution to provide are to be found in ss 162, 163 and 164 of the Criminal Procedure Code. They do not say that an accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge (see p 594 C -D).
- (2) Section 51 of the Criminal Procedure Code enables accused persons to apply for the production of documents (*Public Prosecutor v Teoh Choon Teck* [1963] MLJ 34 and *Haji Abdul Ghani bin Ishak v Public Prosecutor* [1980] 2 MLJ 196 referred). It merely gives the applicant the right of inspection and he has to make copies of the documents himself (*Haji Abdul Ghani bin Ishak v Public Prosecutor* [1980] 2 MLJ 196 referred). Section 51 does not allow an accused to ask for discovery of documents or inspection of documents seized by the police in the course of their investigation since to do so would be tantamount to inspection of the evidence of the prosecution by the defence prior to the trial (see p 594G-I).

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- A (3) In exercising the discretion under s 51, the court will have to consider the justice of the case and the stage of the proceedings the application is made. The court to which applications of this nature must be addressed is the court before which the trial is pending or in which the trial is proceeding. Any order made is final in its effect and is therefore appealable under s 307(1) of the Criminal Procedure Code. It is a general rule that the High Court should not exercise its revisionary jurisdiction when a decision complained of is appealable and no appeal has been lodged (see p 595A-B); *Public Prosecutor v Raymond Chia Kim Chwee & Anor*; *Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 followed; *Dorai Manickam Alias Davis v Rex* [1936] MLJ 209 referred.
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- D (4) On the facts the oral application made by the accused in the sessions court was in substance one under s 51 though in form it was not. The proper remedy that the accused ought to have pursued would have been to have appealed against the order made. The application for revision before the High Court was therefore wrong in law (see p 595B-C).

[Bahasa Malaysia summary]

- E Tertuduh telah dituduh dengan kesalahan merogol di dalam Mahkamah Sesyen Kuala Lumpur. Beliau membuat permohonan lisan untuk dibekalkan dengan butiran mengenai saksi-saksi, pernyataan-pernyataan saksi-saksi kepada polis, pelan lakar dan gambar foto-gambar foto yang diambil di tempat kejadian. Permohonan itu telah ditolak. Beliau kemudiannya telah membuat permohonan bertulis yang ditarik balik. Permohonan yang serupa telah difailkan tetapi telah ditolak oleh mahkamah sesyen dengan alasan bahawa perkara itu telah dibicarakan apabila permohonan lisan ditolak. Tertuduh selepas itu memfailkan notis usul di dalam Mahkamah Tinggi memohon perintah serupa di dalam penggunaan kuasa penyemakan Mahkamah Tinggi.
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Diputuskan, menolak permohonan itu:

- H (1) Permohonan-permohonan yang dibuat di dalam Mahkamah Tinggi dan di dalam mahkamah sesyen adalah untuk pengemukaan dokumen-dokumen yang dianggap perlu untuk perbicaraan yang tertuduh menghadapi. Apa yang pihak pembelaan di dalam perbicaraan jenayah berhak kepada dan apa tanggungjawab pihak pendakwaan untuk membekalkan adalah diperuntukkan di dalam ss 162, 163 dan 164 Kanun Acara Jenayah. Ia tidak mengatakan bahawa tertuduh berhak mengetahui cara bagaimana pihak pendakwaan akan membuktikan fakta-fakta yang dikatakan di dalam tuduhan (lihat ms 594 C -D).
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- (2) Seksyen 51 Kanun Acara Jenayah membolehkan tertuduh memohon untuk pembekalan dokumen-dokumen (*Public Prosecutor v Teoh Choon Teck* [1963] MLJ 34 dan *Haji Abdul Ghani bin Ishak v Public Prosecutor* [1980] 2 MLJ 196 dirujuk). Ia memberikan pemohon hak pemeriksaan dan beliau perlu membuat salinan dokumen-dokumen itu sendiri (*Haji Abdul Ghani bin Ishak v Public Prosecutor* [1980] 2 MLJ 196 dirujuk). Seksyen 51 tidak membenarkan tertuduh untuk memohon pendedahan dokumen-dokumen atau pemeriksaan dokumen-dokumen yang disita oleh polis di dalam penyiasatan mereka kerana untuk membuat demikian adalah sama seperti pemeriksaan keterangan pihak pendakwaan oleh pihak pembelaan sebelum perbicaraan (lihat ms 594G-I). A
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- (3) Di dalam menggunakan budibicara di bawah s 51, mahkamah perlu menimbangkan keadilan kes dan tahap prosiding permohonan itu dibuat. Mahkamah kapada mana permohonan seperti ini mesti dibawa adalah mahkamah perbicaraan yang belum selesai atau perbicaraan sedang dijalankan. Setiap perintah yang dibuat adalah muktamad dan boleh dirayukan di bawah s 307(1) Kanun Acara Jenayah. Ia merupakan perintah am bahawa Mahkamah Tinggi tidak patut menggunakan bidang kuasa penyemakan apabila suatu keputusan boleh dirayukan dan rayuan belum dibuat (lihat ms 595A-B); *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor* [1985] 2 MLJ 436 diikuti; *Dorai Manickam Alias Davis v Rex* [1936] MLJ 209 dirujuk. D
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- (4) Pada fakta-fakta permohonan lisan yang dibuat oleh tertuduh di dalam mahkamah sesyen adalah pada amnya satu di bawah s 51 walaupun bukan di dalam bentuknya. Remedi yang betul yang tertuduh patut memohon adalah untuk merayu terhadap perintah yang dibuat. Permohonan untuk penyemakan di hadapan Mahkamah Tinggi adalah salah di sisi undang-undang (lihat ms 595B -C). F

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Notes

For cases on defences, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1414-1482.

For cases on defences in trial, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3982-3987. H

For cases on right of accused to copies of statements, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 2218-2223.

Cases referred to

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Dorai Manickam Alias Davis v Rex [1936] MLJ 209 (refd)

Haji Abdul Ghani bin Ishak v Public Prosecutor [1980] 2 MLJ 196 (refd)

- A** *PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 (folld)
PP v Teoh Choon Teck [1963] MLJ 34 (refd)

Legislation referred to

- B** Criminal Procedure Code ss 51, 162, 163, 164, 307(1)
Charles Hector (Roland Engan with him) (Hector & Co) for the applicant
Stanley Clement Augustin (Attorney-General's Chambers) for the respondent

- C** **Appeal from** Kes Tangkap Bil 3-62-10-2002 (Sessions Court, Kuala Lumpur)

- D** **Augustine Paul J:** On 25 January 2002 the accused was charged with an offence of rape in the Sessions Court at Kuala Lumpur where he made an oral application to be supplied with particulars of the witnesses and their statements to the police and the sketch plan and photographs taken at the scene. The application was dismissed. Then on 22 November 2002 he made a written application to the sessions court asking for the following:

- E** (a) bahawa situduh dibekalkan dengan salinan kesemua pernyataan-pernyataan bertulis yang dibuat oleh saspek-saspek lain, saksi-saksi, pengadu dan mana-mana orang lain berkenaan kes ini yang telah dibuat semasa penyiasatan mengenai kes ini dan/atau yang berkenaan dengan kes ini;
- F** (b) bahawa situduh dibekalkan dengan rajah kasar serta kunci rajah kasar, lakaran atau peta dan gambar foto yang diambil berkenaan tempat kejadian di mana hal perkara yang dinyatakan dalam kertas pertuduhan telah berlaku;
- G** (c) bahawa situduh dibekalkan dengan nama kesemua saspek-saspek lain, saksi-saksi, pengadu dan mana-mana orang lain berkenaan kes ini;
- (d) Bahawa situduh dibekalkan apa-apa dokumen, laporan, laporan perubatan, laporan polls, laporan kimia, laporan DNA serta senarai/maklumat bahan-bahan yang berkenaan dengan kes dan pertuduhan terhadap situduh;
- H** (e) Bahawa situduh dibekalkan dengan maklumat mengenai kawat cam serta nama mereka yang mengambil bahagian dalam kawat cam termasuk nama-nama saspek lain yang dihadapkan di hadapan kawat cam;
- (f) Bahawa situduh dibekalkan dengan laporan polls yang menyatakan gari telah digunakan dalam insiden hal perkara pertuduhan ATAU secara alternatif mendapat pengesahan bahawa lapuran sedemikian tidak pernah wujud;
- I** (g) Perintah bahawa kesemua yang diminta dalam permohonan ini dibekalkan kepada situduh dalam masa sepuluh (10) hari daripada tarikh perintah;

(h) Lain-lain perintah yang mahkamah yang mulia fikirkan adil dan wajar. **A**

The application was fixed for hearing on 28 February 2003. The date was then brought forward to 17 February 2003. A request for adjournment by counsel was rejected by the sessions court and the application was withdrawn. The accused then refiled a similar application. It was fixed for hearing on 19 March 2003. On that day the application was dismissed by the sessions court on the ground that the matter has already been adjudicated upon when the oral application was dismissed. On 23 April 2003 the accused filed a notice of motion in the High Court praying for a similar order in the exercise of its revisionary powers. **B**

The applications made in the High Court and in the sessions court are for the production of documents considered to be necessary for the trial that the accused is facing. What the defence in a criminal trial is entitled to and what it is the duty of the prosecution to provide are to be found in ss 162, 163 and 164 of the Criminal Procedure Code. They do not say that an accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge (see *Public Prosecutor v Teoh Choon Teck* [1963] MLJ 34). The only provision of law that deals with an application of the nature made in this case is s 51 of the Criminal Procedure Code ('s 51') which reads as follows: **C**

- (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order. **D**
- (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same. **E**
- (3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities. **F**

Section 51 enables accused persons to apply for the production of documents (see *Public Prosecutor v Teoh Choon Teck*, *Haji Abdul Ghani bin Ishak v Public Prosecutor* [1980] 2 MLJ 196). It merely gives the applicant the right of inspection and he has to make copies of the documents himself (see *Haji Abdul Ghani bin Ishak v Public Prosecutor*). In *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1982] 2 MLJ 186 it was held that s 51 does not allow an accused to ask for discovery of documents or inspection of documents seized by the police in the course of their investigation since to do so would be tantamount to inspection of the evidence of the prosecution by the defence prior to the trial. In *Public Prosecutor v Raymond Chia Kim* **G**

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A *Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 it was held that in exercising the discretion under s 51 the court will have to consider the justice of the case and the stage of the proceedings the application is made. The court to which applications of this nature must be addressed is the court before which the trial is pending or in which the trial is proceeding. It was further held that any order made is final in its effect and is therefore appealable under s 307(1) of the Criminal Procedure Code. B It is a general rule that the High Court should not exercise its revisionary jurisdiction when a decision complained of is appealable and no appeal has been lodged (see *Dorai Manickam Alias Davis v Rex* [1936] MLJ 209).

C It would appear that the oral application made by the accused in the sessions court is in substance one under s 51 though in form it was not. Perhaps it was dismissed as the prescribed procedure was not followed. The proper remedy that the accused ought to have pursued would have been to have appealed against the order made. He did not do that. The application before me is therefore wrong in law. No arguments were addressed to me as to why I should exercise my powers of revision in the circumstances of the case. Accordingly, I dismissed the application. D

Application dismissed.

Reported by Andrew Christopher Simon

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